No. 80-655

In the Supreme Court of the United States

OCTOBER TERM, 1980

NICHOLAS J. NICKOLAOU AND AUDREY LOMBARDI,
PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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Petitioners claim (Pet. 3) that the Chicago Board Options Exchange and the Securities and Exchange Commission imposed sanctions against them without applying a "clear and convincing evidence" standard of proof.

Petitioners were sanctioned by the Chicago Board Options Exchange (CBOE) for violations of certain CBOE rules, based on their attempts to manipulate the market price of IBM stock and options. The evidence at their hearing established that they forged three large orders to sell stock and delivered those orders for execution (Pet. App. 2a-4a). Following an independent review of the record of the CBOE disciplinary proceeding under Section 19(e) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(e), the Commission found, based on

its application of the "clear and convincing evidence" standard of proof, that petitioners had violated the CBOE rules (Pet. App. 12a n.2).[1]

On review of the Commission's order under Section 25(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78y(a), the court of appeals found substantial evidence to support the Commission's factual findings (Pet. App. 6a). The court did not consider the question whether a "clear and convincing evidence" standard should have been used by the CBOE "in light of the fact that the Commission has independently examined the record and concluded that by clear and convincing evidence petitioners have violated CBOE rules" (*id.* at 7a).

Contrary to petitioners' assertion (Pet. 3), this case and *Steadman* v. *SEC*, 603 F. 2d 1126 (5th Cir. 1979), cert. granted, No. 79-1266 (Apr. 28, 1980), are not "companion" cases. Moreover, in contrast to *Steadman,* the Commission, in an abundance of caution, utilized the "clear and convincing evidence" standard of proof to evaluate the record in this proceeding.[2] Accordingly, there is no need to hold the present petition pending disposition of the *Steadman* case.[3]

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[1] The Commission assumed, without deciding, that the "clear and convincing evidence" standard of proof is applicable in this proceeding (Pet. App. 12a n.2). The Commission modified one portion of the sanction imposed on petitioner Nickolaou, but otherwise affirmed the sanctions ordered by the CBOE (*id.* at 18a-19a).

[2] In affirming a disciplinary order entered by a self-regulatory organization, the Commission must make its own independent finding of a violation. *Shultz* v. *SEC*, 614 F. 2d 561, 568 (7th Cir. 1980); *Sartain* v. *SEC*, 601 F. 2d 1366, 1371 (9th Cir. 1979); *Todd & Co.* v. *SEC*, 557 F. 2d 1008, 1012 (3d Cir. 1977); *R. H. Johnson & Co.* v. *SEC*, 198 F. 2d 690, 695 (2d Cir.), cert. denied, 344 U.S. 855 (1952).

[3] We also note that the petition was not filed within the 90 day period prescribed under 28 U.S.C. 2101(c). The judgment of the court

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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of appeals in this civil case was entered on July 18, 1980 (Pet. App. 9a). Petitioners did not seek rehearing, nor did they obtain an extension of time for filing a petition for a writ of certiorari. Accordingly, the 90 day period prescribed by Section 2101(c) expired on October 16, 1980. The petition was not received by the Court until October 17, 1980.

At the Commission's request, the court of appeals amended its judgment on August 12, 1980, to delete an award of costs in the Commission's favor that was not authorized by statute (Pet. App. 10a). The Commission's request to delete the erroneous award of costs did not stay the running of the period of time in which to petition for certiorari because the amended judgment did not change a matter of substance in the judgment previously rendered. *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211 (1952).

We are advised that petitioner has not filed a notarized statement from a member of the bar of this Court setting forth the information required by Rule 28.2 of the Rules of the Court, which is necessary if petitioner wishes to rely on the date of mailing of the petition rather than the date of actual receipt by the Clerk's office.

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